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Supreme Court of the United States

OCTOBER TERM, 1966.

No. 548

BERNARD G. McGARRY ET AL.,
Respondents,

v.

WILLIAM E. RILEY, SPECIAL AGENT,
INTELLIGENCE DIVISION, INTERNAL REVENUE SERVICE,
Petitioner.

PETITION FOR WRIT OF CERTIORARI AND MOTION TO USE RECORD ON FILE IN CONTEMPORARY PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

BERNARD G. McGARRY ET AL.,
Respondents, Appellants,

v.

WILLIAM E. RILEY, SPECIAL AGENT,
INTELLIGENCE DIVISION, INTERNAL REVENUE SERVICE,
Petitioner, Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts, entered January 5, 1966 (R. 123-137), is reported at 248 F. Supp. 545. The opinion of the Court of Appeals for the First Circuit, entered July 11, 1966, is not yet officially reported, but is annexed hereto as Appendix A.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered July 11, 1966 (Appendix B). The jurisdiction of the Court is invoked under 28 U.S. Code, § 1254 (1).

Statute Involved.

The pertinent statutory provision, Section 7602, 26 U.S. Code, Internal Revenue Code of 1954, is set forth in Appendix C.

Questions Presented.

Where special agents of the Organized Crime Division of the Internal Revenue Service are conducting a criminal investigation of a taxpayer, and conduct such investigation by the issuance of administrative subpoenas under Section 7602 to corporate entities, for the purpose of criminal discovery against an individual, and where the Organized Crime Division was formed as a result of the request of the Attorney General of the United States in his drive against organized crime and in the investigation of major racketeers, and where "saturation type" investigation was demanded by the Commissioner as a result of the request of the U.S. Department of Justice,

(1) Whether the use of administrative subpoena power, which is authorized by Congress under Section 7602 for civil purposes only, can be used for the purpose of a criminal investigation;

(2) Whether Congress intended, by Section 7602, to give to the Internal Revenue Service the inquisitorial powers of a Grand Jury;

(3) Whether assumption of inquisitorial powers of a Grand Jury by the Internal Revenue Service is a revival of the pre-revolutionary and much censured general warrants and writs of assistance;

(4) Whether the use of administrative subpoenas under Section 7602 to corporate entities is unconstitutional because it usurps the inquisitorial powers of a Grand Jury to investigate crime committed by an individual, and is therefore an "unreasonable search and seizure," which is prohibited by the Fourth Amendment to the Constitution of the United States, and which Fourth Amendment protects corporate entities;

(5) Whether the use of administrative subpoenas under Section 7602 to corporate entities is unconstitutional because it usurps the inquisitorial powers of a Grand Jury to investigate crime committed by an individual, and is therefore, by historic reason, an "unreasonable search and seizure" of the individual, which is prohibited by the Fourth Amendment to the Constitution of the United States;

(6) Whether the usurpation by an administrative agency of the inquisitorial powers of a Grand Jury to investigate crime is unconstitutional as a violation of the Due Process Clause of both the Fifth and Fourteenth Amendments;

(7) Whether the usurpation by an administrative agency of the inquisitorial powers of a Grand Jury to investigate crime is, by historic reason, an intrinsic violation of that part of the Fifth Amendment which reads: "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, . . .";

(8) Whether attorneys, who are representing an individual against whom a criminal discovery is sought and corporate entities against whom unconstitutional and un-

lawful subpoenas are issued, can be held guilty of a civil contempt by the Court in refusing to allow photostating of corporate records by the Organized Crime Division of the Internal Revenue Service to be used in a criminal prosecution where a criminal prosecution was already recommended by the Organized Crime Division, Internal Revenue Service investigator, who was doing the photographing, their exclusive purpose being criminal and the Organized Crime Division having no civil function.

Statement of the Case.

(References to the record in the instant case appear as R.; references to the record filed in the contemporary petion for writ of certiorari entitled "Lawrence F. O'Donnell, Petitioner, Appellant, v. Paul A. Sullivan, Special Agent, Internal Revenue Service et al., Respondents, Appellees," appear as C.R.)

On March 19, 1964, Special Agent Frank E. Rose of the Internal Revenue Service issued three summonses under authority of 26 U.S.C. § 7602, in connection with an investigation of appellant Bernard G. McGarry and of Marie G. McGarry. The summonses were directed to "McGarry's, Inc., Claire M. Harrington, President and Treasurer," J. E. Poor Co., Inc., Claire M. Harrington, Treasurer," and "Ye Olde Brown Jug, Inc., Bernard G. McGarry, Treasurer." In each instance the summons was served on the named corporate officer and required each to appear before Special Agent William E. Riley of the Internal Revenue Service at a stated time and place to give testimony relating to the tax liability of Bernard G. McGarry and Marie G. McGarry and to bring and produce for examination the corporate records for the years 1952 through 1961 (R. 9, 16).

The legality of the summonses was challenged and a petition for enforcement was filed on July 15, 1964, by Special Agent Frank E. Rose (R. 4). On September 18, 1964, the trial Court ordered that the summonses be enforced, and this order was, on appeal, affirmed on May 3, 1965 (R. 124). A petition for a stay pending application for a writ of certiorari was denied on June 3, 1965, and on June 29, 1965, a new order enforcing the summonses was entered, which order commanded Harrington and McGarry to appear and produce before Special Agent Riley on July 9, 1965, the records called for examination by the respective summonses (R. 124).

In conformity with such order the appellants appeared and produced the books and records before Special Agent Riley (R. 23). On such occasion the appellants made known that a representative thereof would remain present while the examination was being conducted, and when not present the records were to be maintained in a sealed condition at the premises of the Internal Revenue Service (R. 28); further, that no photographing of the records would be permitted (R. 27). The examination went forward under the above-enumerated conditions until August 19, 1965, at which time Riley stated the examination would include photostating of the records on August 23, 1965 (R. 32). On the latter date appellants Greene and O'Donnell removed the records from the premises of the Internal Revenue Service after making a statement that such action was prompted because of the declared intention to photograph the records (R. 108).

On September 16, 1965, a petition for civil contempt was filed and on September 28, 1965, a hearing was held thereon (R. 1). It was at this hearing for the first time that Special Agent Frank E. Rose and Special Agent William Riley disclosed that they were members of the Organized Crime Division of the Internal Revenue Service (R. 106 and R.

38), having previously always identified themselves only Special Agents of the Intelligence Division.

It was at this hearing that Special Agent Riley stated that he was the Case Supervisor and that Special Agent Frank Rose and Revenue Agent John Roberson worked under his control; that he entered on the duty of Case Supervisor of the McGarry matter on March 6, 1964 (R. 22); that he was making the investigation to determine whether there was a criminal recommendation possible (R. 72).

It was at this hearing that Special Agent Rose stated that he had served the summonses involved in this case on March 19, 1964 (R. 101), which summonses commanded the appearance before Special Agent Riley.

The Organized Crime Division was created by the Internal Revenue Service in 1961 as a part of the Government's drive against organized crime and was prompted by the request of the Attorney General to the Internal Revenue Service to give top priority to the investigation of the tax affairs of major racketeers (C.R. 412). The Organized Crime Division was to maintain complete co-operation at the working level with the attorney or attorneys assigned by the Department of Justice and the tax returns of the major racketeers identified by that Department are to be subjected to the "saturation type" investigation and full use is to be made of available electronic equipment and other technical aids as well as such investigative techniques as surveillance, and under-cover work (C.R. 414).

Reasons for Granting the Writ.

The decision below rests in part upon questions of federal law which have not been settled by this Court, and in part upon questions of federal law in conflict with the applicable decisions of this Court.

So far as petitioners know, this Court has never passed upon the use of administrative subpoenas under Section 7602 by the Organized Crime Division of the Internal Revenue Service. The annunciated rule of law upon various aspects of some of the issues in this case, but not upon all, have been, on occasion, decided by this Court under varying circumstances. It is not too often that a case arises wherein so many issues have been raised, because of the facts in this case, at one and the same time, on fundamental principles pertaining to violations of the amendments to the Constitution, the Fourth, the Fifth and the Fourteenth. The use of administrative subpoenas under Section 7602 to ferret out, not a crime known to have been committed, but to discover whether a crime has been committed at all, upon the whim, fancy, desire or control of an administrative agency, encroaches upon the time-honored inquisitorial functions of the Grand Jury and violates the Due Process Clauses of the amendments to the Constitution.

The use of these administrative subpoenas in such a manner runs counter to those fundamental principles of law enforcement and the protections arising thereunder as appeared subsequent to the Magna Charta, and as were practiced under the Common Law, and which subsequently, in spirit, were incorporated into the Constitution of the United States.

It may be that it can be said, as has been often said before, that this type of procedure is that type wherein "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 535.

A. In Conflict with Previous Decisions of This Court.

In *Reisman* v. *Caplin*, 375 U.S. 441, 84 S. Ct. 508 (1964), this Court said that Section 7602 authorizes the Secretary

of the Treasury, or his delegate, for "the purpose of ascertaining the correctness of any return . . . , determining the liability of any person for any internal revenue tax . . . , or collecting any such liability . . . (t)o summon the person liable for tax . . . , or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . , or any other person the Secretary or his delegate may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . ," and held that this section cannot be used for the improper purpose of obtaining evidence for use in a criminal prosecution.

The record shows that the investigation being conducted by the Organized Crime Division was by the use of Section 7602 to determine whether there was a possibility of a criminal recommendation of the individual taxpayers (R. 34, 72).

B. Questions of Federal Law which have Not been Settled by This Court.

(1) Whether Congress intended, by Section 7602, to give to the Internal Revenue Service the inquisitorial powers of a Grand Jury;

(2) Whether assumption of inquisitorial powers of a Grand Jury by the Internal Revenue Service is a revival of the pre-revolutionary and much censured general warrants and writs of assistance;

(3) Whether the use of administrative subpoenas under Section 7602 to corporate entities is unconstitutional because it usurps the inquisitorial powers of a Grand Jury to investigate crime committed by an individual, and is therefore an "unreasonable search and seizure" which is

prohibited by the Fourth Amendment to the Constitution of the United States, and which Fourth Amendment protects corporate entities;

(4) Whether the use of administrative subpoenas under Section 7602 to corporate entities is unconstitutional because it usurps the inquisitorial powers of a Grand Jury to investigate crime committed by an individual, and is therefore, by historic reason, an "unreasonable search and seizure" of the individual, which is prohibited by the Fourth Amendment to the Constitution of the United States;

(5) Whether the usurpation by an administrative agency of the inquisitorial powers of a Grand Jury to investigate crime is unconstitutional as a violation of the Due Process Clause of both the Fifth and the Fourteenth Amendments;

(6) Whether the usurpation by an administrative agency of the inquisitorial powers of a Grand Jury to investigate crime is, by historic reason, an intrinsic violation of that part of the Fifth Amendment which reads: "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury. . .";

(7) Whether attorneys who are representing an individual against whom a criminal discovery is sought and corporate entities against whom unconstitutional and unlawful subpoenas are issued can be held guilty of a civil contempt by the Court in refusing to allow photostating of corporate records, being baited and provoked by the Internal Revenue Service and having, from the outset, objected to a court order allowing such examination, and which court order did not specify photostating;

(8) Where records are produced in compliance with a summons issued under Section 7602 of Title 26 of the U.S. Code after a court order thereon; and where such court

order is merely "produce for examination" and does not include therein the authority for photographing of such records; and where the constructive possession and control of such records are retained by the taxpayer by means of limiting the examination only in the presence of the taxpayer and otherwise the records are to be maintained in a sealed condition on the premises of the Internal Revenue Service; and where the records are produced with the specific instruction that the same are not to be photographed; and where after a period of examination the Internal Revevenue Service ultimates that it will photograph; and whereupon the taxpayer's representatives resume actual possession of such records and no demand has ever been made for a return thereof to continue the examination; and where neither party sought a clarification of the court order or modification in respect to any of the conditions imposed by the appellants; whether under all these circumstances resumption of actual possession is contemptuous conduct.

The instant case is compared to and distinguished from the following cases:

Oklahoma Press Publishing Co. v. *Walling* (1946), 327 U.S. 186, 66 S. Ct. 494.

Subpoenas were issued by the Wage and Hour Division, United States Department of Labor, for the production of corporate records to determine whether there was a violation of the Fair Labor Standards Act. The Court held, among other things, that the subpoenas were proper where the Congress expressly authorized the Administrator to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem . . . appropriate to determine whether any

person has violated any provision of this Act, or which may aid in the enforcement of this Act" (at page 199).

In the instant case, Congress has not expressly authorized the use of subpoenas under Section 7602 to discover and procure evidence of a criminal violation committed by corporate entities, and much less so for the purpose of discovering and procuring evidence, through the use of such administrative subpoenas to corporate entities, of a criminal violation committed by an individual.

Wilson v. *United States* (1911), 221 U.S. 361, 31 S. Ct. 538.

Subpoenas were issued by a Grand Jury to corporate entities to produce certain records, in their continued investigation of criminal violations by an individual whom it had already indicted.

If the holding in this case is to be extended to the Internal Revenue Service, it would be to invest the Internal Revenue Service, or any administrative agency, with the same inquisitorial powers of a Grand Jury and would in a great measure supplant such Grand Jury by relegating it to an inferior role.

It was said in *Costello* v. *United States* (1956), 350 U.S. 359, 362, 76 S. Ct. 406, 408:

> "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the

body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so."

It was also said in *Blair* v. *United States* (1919), 250 U.S. 273, 280, 39 S. Ct. 468, 470:

> "At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States."

And the Court further said (250 U.S. at 282):

> "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As

has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States,* 223 U. S. 178, 184."

It was said in *Frisbie* v. *United States* (1895), 157 U.S. 160, 163, 15 S. Ct. 586, 587 (cited with approval in *Hale* v. *Henkel* (1906), 201 U.S. 43, 26 S. Ct. 370):

> "But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment."

It was said in the dissenting opinion in *Hannah* v. *Larche* (1960), 363 U.S. 420, 497, 80 S. Ct. 1502, 1548:

> "The grand jury is the accusatory body in federal law as provided by the Fifth Amendment."

And further (363 U.S. at 499):

> "They are the only accusatory body in the Federal Government that is recognized by the Constitution. I would allow no other engine of government, either executive or legislative, to take their place—at least when the right of confrontation and cross-examination are denied the accused as is done in these cases."

Since corporate entities are entitled to the protection of the Fourth Amendment as to "unreasonable searches and seizure" (*Hale* v. *Henkel,* 201 U.S. 43, 26 S. Ct. 370; *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40

S. Ct. 182; *Wilson* v. *United States,* 221 U.S. 361, 31 S. Ct. 538; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 66 S. Ct. 494), the use of the administrative subpoena under Section 7602 was not for a lawful purpose, thereby rendering such use an "unreasonable search and seizure" which is prohibited by the Fourth Amendment.

Two broad categories of law enforcement are suggested:

A. Law enforcement in the investigation of a crime known to have been committed;

B. Law enforcement to discover whether a crime has been committed.

For the present we are not concerned with the first (A) of these categories.

The second category (B), petitioners feel, falls within the spirit of the Due Process Clauses contained in both the Fifth and the Fourteenth Amendments.

The concept of due process has not been an easy one to define. Differing and different Courts have, at different times, stated their interpretation of due process, with reference to early leading English authorities such as the eminent Lord Coke. *Jones* v. *Robbins* (Mass.) (1857), 8 Gray 329. *Hurtado* v. *California* (1884), 110 U.S. 516, 4 S. Ct. 111.

Petitioners must be content to conclude, by analogy, with the Court's opinion in *Federal Trade Commission* v. *American Tobacco Co.* (1924), 264 U.S. 298, 305-306, 44 S. Ct. 336, 337:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U.S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question

whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent."

And the Court further said (264 U.S. at 307):

"We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion —but, even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408. *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION TO USE RECORD ON FILE IN CONTEMPORARY PETITION FOR WRIT OF CERTIORARI.

Petitioners respectfully move that, in connection with the present petition for certiorari, the Court permit the use of the record which is presently on file in a contemporaneous petition for a writ of certiorari, October Term, 1966, in the matter of and entitled

"LAWRENCE F. O'DONNELL,
Petitioner,
v.
PAUL A. SULLIVAN, Special Agent, Internal Revenue Service, et al.,
Respondents".

for the reason that:

(1) The formation, personnel, existence, and purpose of the Organized Crime Division of the Internal Revenue Service is set forth in this record, all of which will aid and assist the Court in its adjudication.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6685.

BERNARD G. McGARRY ET AL.,
RESPONDENTS, APPELLANTS,
v.
WILLIAM E. RILEY,
SPECIAL AGENT, INTELLIGENCE DIVISION,
INTERNAL REVENUE SERVICE,
PETITIONER, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Lawrence F. O'Donnell, with whom *Mitchell G. Hadge* and *John B. Greene* were on brief, for appellants.

Edward F. Harrington, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

July 11, 1966.

COFFIN, *Circuit Judge*. This appeal raises the question whether attorneys, claiming that a court order enforcing summonses for the production of client's records issued

pursuant to 26 U.S.C. § 7602 is ambiguous and serves a non-statutory purpose, can properly resort to self help and remove such records before completion of the examination. We hold they cannot.

The prior judicial history of the tax investigation forming the subject matter of this case is already lengthy, tortuous, and bellicose.[1] The district court in its opinion dated January 6, 1966 ably set forth both factual findings and legal conclusions. Its order adjudged appellants guilty of civil contempt and ordered that the records in controversy be made available to the Internal Revenue Service for purposes of a complete and unhindered examination for a maximum period of forty-five days.[2] This appeal was then taken.

The order, which appellants have been found below to have wilfully disobeyed, was one link in a lengthy chain of events in connection with an investigation of the tax liability of Bernard G. McGarry and of Marie G. McGarry. It was preceded by summonses, refusal to produce, challenges to their legality, petition for enforcement, a prior

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[1] *Lord* v. *Kelley*, D. Mass., 1963, 223 F. Supp. 684, ordered the return of records improperly obtained by the government. Appellate jurisdiction of an appeal from this decision was held lacking in *Lord* v. *Kelley*, 1 Cir., 1964, 334 F.2d 742, *cert. denied* 379 U.S. 961. Subsequently, the district court refused to hold in either civil or criminal contempt an Internal Revenue agent for disobeying in part the court's order. *Lord* v. *Kelley*, D. Mass., 1965, 240 F. Supp. 167.

The summonses before us now were also before us on appeal from a district court order of enforcement, affirmed in *McGarry's, Inc.* v. *Rose*, 1 Cir., 1965, 344 F.2d 416.

To these we add not only the present opinion but another issued this date, *O'Donnell* v. *Sullivan*, 1 Cir., 1966, ___F.2d___.

[2] While the examination has been completed, both sides have urged that the controversy not be considered moot, since an adjudication of civil contempt against appellants, both of whom are lawyers, might conceivably be the basis for disciplinary action, and since the validity of the summonses and order might be in issue in future proceedings.

order of enforcement, appeal, affirmance on appeal, and denial of a stay of enforcement by a Supreme Court Justice. This order directed appellants to produce before the appellee, a special agent of the Intelligence Division of the Internal Revenue Service, certain corporate papers and records called for in the summonses.

Appellants and their clients duly appeared with the records before the appellee, setting forth the following ultimatums governing the examination: appellants would be present; no photostatic copies would be made; since the order directed production on a specific day, no more time for examination would be allowed (subsequently withdrawn); apppellants would repossess the records after each day's work. After considerable negotiation, the government, in an effort to avoid further controversy, entered into an arrangement whereby the records would not be examined except in the presence of one of the attorneys or some other person authorized by them. It was also agreed that at the conclusion of each day's examination the records would be placed in boxes and that these would be sealed and kept in a locked room until the examination was to be resumed.

The records remained with the Internal Revenue Service for 31 business days, usually in a sealed state. Out of these 31 days one agent worked 11-1/2 days on the records. On 19-1/2 days no work was performed. On 5-1/2 of these days no work was done because an agent was not available. And on the remaining 14 days, work on the records was suspended either at the request of appellant Greene or because of the failure of both appellants to appear. At no time were the seals broken in the absence of one of the appellants.

In an effort to complete the examination with sufficient speed, the government informed Greene on the 27th day that some of the records would be photostated. After threats by appellants and a further delay of several days,

both appellants appeared on the 32nd day when examination was to be resumed. Appellant O'Donnell requested the boxes containing the records to be brought into the room and thereupon threw his briefcase on top of the boxes and said, "I now have possession of these records and I am taking them out of here". After being informed that the examination was not yet completed, O'Donnell made a statement giving, in substance, two reasons for taking the records away: (a) that the agents had no right to photostat the records, and (b) that they had already been given a reasonable amount of time to complete the examination. At the conclusion of the statement, appellants physically carried the records away.

The district court found these reasons to be spurious and mere pretexts for the removal of the records. The real reason for the removal, as found below, was to prevent the completion of the examination and to impede and obstruct the investigation of McGarry's tax liability. In addition, the court found that when appellants took the records they both knew that the examination had not been completed, and both had full knowledge of the contents of the district court's order and of the summonses to which the order related.

There was no attempt on the part of O'Donnell or Greene to bring the matter before the district court to obtain an opinion as to their right to remove and withhold the records from the Internal Revenue Service or to seek a modification of the order.[3]

The primary issue here is the right of an attorney to take the law into his own hands when he feels that an

[3] While the judge issuing the order had indicated that he wished no further orders to be submitted to him, appellant O'Donnell was aware of the availability of an emergency judge and testified that he did not attempt to seek judicial clarification because ". . . that was a strategical judgment for me to make."

order of court is technically ambiguous, or is being wrongly interpreted. The district court found spurious the avowed reasons for removal of the records. We do not disagree with this finding. But even had the reasons been genuine or well founded, this would not have justified unilateral self help.

Appellants have cited no authority whatsoever rationalizing this kind of action. Referring to persuasive authority to the contrary, we note the words of the Supreme Court in *United States* v. *United Mine Workers of America*, 1947, 330 U.S. 258, 293: "The defendants, in making their private determination of the law, acted at their peril . . . [A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." And Mr. Justice Frankfurter added in his concurring opinion, "Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper." 330 U.S. at 309-310.[4]

In this case there was no question but that the order was within the jurisdiction of the court, was not a flagrant violation of any constitutional right, and did not confront appellants with a Hobson's choice of irremediable injury or contempt.[5] Whatever latitude for self help may be

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[4] While *In re Green*, 1962, 369 U.S. 689, may be said to limit the scope of *Mine Workers*, the case at bar, involving a federal court order, falls within the rationale of the *Green* reference to *Mine Workers*. 369 U.S. 689 n. 1.

[5] The factual situation in the case at bar may be distinguished from cases arising under Rule 34 of the Federal Rules of Civil Procedure, where defendant refused to produce documents in the first instance, alleging that plaintiff had not demonstrated the requisite "good cause". See *Guilford National Bank of Greens-*

allowable in other cases, there was none in this. Understandable zeal for a client's cause cannot exculpate. The judgment of contempt is affirmed.

In view of the protracted history of litigation in this case, and its probable projection into the future, we do not hesitate to say that both grounds asserted by appellants in justifying their resistance to the summonses and the orders enforcing them are without merit.

While the order disobeyed by appellants did not specify that photostating could be done, it is inconceivable today that a right to examine and copy from voluminous files does not also assume that photostating can be done. Appellants apparently took the mutually contradictory positions of insisting at once on laborious hand-copying and on expedition. At no point did they ever specify in what respects photostating would prejudice their clients while penmanship would not. The advantages of applying technology to the reproduction of information were well set forth a decade and more ago in *Boren* v. *Tucker*, 9 Cir., 1956, 239 F.2d 767, 771, and *Westside Ford, Inc.* v. *United States*, 9 Cir., 1953, 206 F.2d 627, 634. While the orders in both these cases specifically authorized photostating, the rationale would seem to apply equally to such an order as that in this case. We can no more imagine a judge, if asked to "clarify" an order for production of documents for examination, excluding photostating than insisting on a quill pen.

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boro v. *Southern Railway Company*, 4 Cir., 1962, 297 F.2d 921, *cert. denied*, 375 U.S. 985. Nor are cases applicable where production was resisted on the ground of executive privilege. See *Appeal of United States Securities and Exchange Commission*, 6 Cir., 1955, 226 F.2d 501.

There was available to appellants an orderly procedure for challenging the order in this case, with rights of appeal and stay. *Reisman* v. *Caplin*, 1964, 375 U.S. 440, 449.

The other substantive objection avowed by defendants is the improper use of the investigative power of 26 U.S.C. § 7602 for purposes of criminal prosecution.[6] The district judge very properly pointed out the necessary interrelationship of civil and criminal aspects involved in many tax investigations. Here the investigatory team consisted of agents interested in both aspects. Over eleven months after issuance of the summonses, criminal prosecution was recommended by the special agents from the Organized Crime Division who were assigned to the case. A subsequent criminal complaint was dismissed at government request. The revenue agent of the Field Audit Division made his own report on the civil aspects.

This was clearly not the situation of *United States* v. *O'Connor,* D. Mass., 1953, 118 F. Supp. 248, where the only avowed purpose of involving section 7602 was to assist a pre-existing criminal prosecution. That the co-existence of criminal and civil investigations does not vitiate a section 7602 summons seems too well established to require more than reference to the authorities. *Lash* v. *Nighosian,* 1 Cir., 1959, 273 F.2d 185, 188, *cert. denied,* 1960, 362 U.S. 904; *Tillotson* v. *Boughner,* 7 Cir., 1964, 333 F.2d 515, 516, 517, *cert. denied,* 378 U.S. 913; *In the Matter of Magnus, Mabee & Reynard, Inc.,* 2 Cir., 1962, 311 F.2d 12, 14-16, *cert. denied,* 370 U.S. 918; *Boren* v. *Tucker, supra,* at 772-773.

Appellants have invoked *Reisman* v. *Caplin,* 1964, 375 U.S. 440, as standing for the proposition that a summons may be challenged for its improper purpose of obtaining evidence for use in a criminal prosecution. This does not

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[6] We discuss this issue even though it might be proper to hold that, since the enforceability of the same summonses between the same parties was the issue decided in *McGarry's, Inc.* v. *Rose, supra,* n. 1, litigation of other defenses which could have been raised in that proceeding are barred.

avail appellants, for (a) the purpose here, being mixed, was proper and (b) the challenge *Reisman* contemplates is that of orderly procedure, not throwing a briefcase on boxes of records and marching off with them.

Affirmed.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6685.

BERNARD G. McGARRY ET AL.,
Respondents, Appellants,

v.

WILLIAM E. RILEY, Special Agent,
Intelligence Division, Internal Revenue Service,
Petitioner, Appellee.

JUDGMENT

July 11, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: the judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Appendix C.

26 U. S. Code Section 7602, Internal Revenue Code of 1954.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summons the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

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237–971—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 548

BERNARD G. MCGARRY, ET AL., PETITIONERS

v.

WILLIAM E. RILEY, SPECIAL AGENT, INTELLIGENCE DIVISION, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–24) is reported at 363 F. 2d 421. The opinion of the district court (R. 123–136)[1] is reported at 248 F. Supp. 545.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1966 (Pet. 24). This petition was filed on September 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Pursuant to a court order enforcing an Internal Revenue Service summons against two corporate offi-

[1] "R." references are to the Record Appendix to Brief for Appellants filed in the court of appeals.

cers, the Internal Revenue Service had in its possession certain corporate records. Thereafter attorneys for the corporate officers prevented the Internal Revenue Service from completing its examination of the records by physically carrying them away. The district court ordered the records returned and adjudged the attorneys guilty of civil contempt, but imposed no penalties. While the appeal from this order was pending, the Internal Revenue Service completed its examination and returned the records. The questions presented are:

1. Whether the civil contempt order is moot.

2. Whether the attorneys may defend their contemptuous action on the ground that the district court's order of production which they violated was erroneous or ambiguous.

3. Whether the corporate officers, who had previously resisted the summonses and been ordered to comply, may now relitigate the validity of the summonses.

4. Whether the district court should have declined to enforce the summonses on the ground—asserted by petitioners—that they were issued in aid of a criminal investigation.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where

none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

STATEMENT

In 1964 the Internal Revenue Service was investigating the tax liabilities of Bernard G. McGarry and his wife. As a part of that investigation Special Agent Rose served administrative summonses on two

corporate officers (petitioners Harrington and McGarry[2]) calling for the production of corporate records. These two petitioners refused to produce the requested documents and the government initiated enforcement proceedings in the district court, which ordered them to comply with the summonses. The court of appeals affirmed. *McGarry's, Inc.* v. *Rose*, 344 F. 2d 416 (C.A. 1). The district court then entered a new order requiring that the records be produced on July 9, 1965. (R. 9–16, 123–124.)

On the latter date petitioners Harrington and McGarry, accompanied by their attorneys, petitioners O'Donnell and Greene, appeared with the records before Special Agent Riley. O'Donnell declared that no photostats would be made and that the records could be examined only while either he or Greene was present. No agreement was reached concerning photostating, but it was arranged that examination would proceed only in the presence of one of these two attorneys, the records to be placed in sealed boxes at the end of each day's examination. The examination thus proceeded from July 9 until August 16, although on approximately fourteen business days the examination was suspended because neither Greene nor O'Donnell appeared. In view of the slow progress, Riley, on August 16, informed Greene that thereafter the schedule of examination would be from 8:30 a.m. until 5:00 p.m. and that some records would be photostated. Greene threatened to remove the records.

[2] Petitioner McGarry is also the subject of the instant tax investigation. However, the summonses requested only corporate records; no personal records or documents were sought.

Neither O'Donnell nor Greene appeared during the rest of the week of August 16 (R. 125–128).

On August 23 the Special Agents, Revenue Agents, O'Donnell and Greene convened in the room where the examination was to be resumed. At O'Donnell's request, all the boxes containing the records were brought into the room. O'Donnell threw his brief case on the boxes, declared that they were thereby in his possession, and said that he would remove them because the agents had had enough time and because they had no right to make photostats. Although told that the examination had not been completed, O'Donnell and Greene carried the records away (R. 128).

The district court found that the Internal Revenue Service had not had the records for an unreasonable length of time, that O'Donnell's objection to photostating was designed to delay and obstruct the examination, that the purpose of the examination was to determine the correctness of the returns and the tax liability of Bernard G. McGarry, and that O'Donnell and Greene knowingly and intentionally violated the court's order enforcing the summonses (R. 130–133). It found O'Donnell and Greene guilty of civil contempt but imposed no penalty.[3] It ordered the clerk of court (to whom the records had been delivered) to deliver the records to the Internal Revenue Service for further examination, including photostating, and enjoined petitioners from interfering with the examination (R. 135–136). The court of appeals affirmed

[3] The court found Harrington and McGarry not guilty of any contempt, because the evidence did not warrant a finding that they authorized the actions of O'Donnell and Greene (R. 133, 135).

(Pet. 24). While the appeal to the court of appeals was pending, the Internal Revenue Service completed its examination of the records involved and returned them to petitioners (Pet. 18, fn. 2).

ARGUMENT

Since the legal position of the two attorneys (petitioners O'Donnell and Greene) is not the same as that of their clients (petitioners McGarry and Harrington), their respective rights will be considered separately.

1. (a) Petitioners O'Donnell and Greene are not entitled to further review because their case is moot. The only contention in which they, as individuals, have any interest is that the *civil* contempt judgment was in error. But even in the case of a *criminal* contempt judgment imposing a sentence of imprisonment, the case is moot once the sentence has been completely served. *St. Pierre* v. *United States*, 319 U.S. 41. In that case, it was observed (p. 43) that, where the sentence has been served, petitioners must show that "further penalties or disabilities can be imposed * * * as a result of the judgment * * *." Here, the only such showing is the conjecture (Pet. 18, fn. 2) that this civil contempt judgment, itself devoid of penalties, might subject petitioners, as attorneys, to disciplinary action. Petitioners cite no cases holding that such a remote and unlikely possibility is sufficient to overcome the rule of mootness, and we submit that it is not "sufficiently substantial

to justify * * * dealing with the merits." *Pollard* v. *United States*, 352 U.S. 354, 358.*

(b) Even if the issue is not moot, O'Donnell and Greene cannot defend their contemptuous conduct by attacking the court order which they violated as ambiguous or erroneous. The district court had previously ordered the documents produced and the court of appeals had affirmed. Pursuant to the district court's order the documents were then turned over to the Internal Revenue Service. Petitioners now claim that they were justified in physically removing the records from the Internal Revenue Service's possession either because the district court's order specified no time limit for termination of the examination or because it was silent as to methods of copying (*e.g.*, photostating) which the Internal Revenue Service might use. The lower courts correctly rejected all such contentions (Pet. 17–22). If petitioners really had any doubt as to whether the Internal Revenue Service had held the documents an unreasonable length of time (31 working days), they could have made an appropriate motion in the district court for return of the documents. If they really thought the district court would require the Internal Revenue Service to hand copy the documents, they could have asked the district court to order the agents not to photostat them. Instead, in

* The government took the position in the court of appeals that the proceeding was not moot. However, since the existence of a present controversy goes to the jurisdiction of the Court and thus can be raised at any stage in the proceeding (*St. Pierre* v. *United States*, 319 U.S. 41, 42), we have reexamined our position.

the face of the district court's extant discovery order, petitioners unilaterally removed the documments from the Internal Revenue Service's possession. As the court of appeals stated (quoting from this Court's decision in *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293), "The defendants, in making their private determination of the law, acted at their peril."

2. (a) The other two petitioners, McGarry and Harrington, were ordered as corporate officers to produce corporate records. Since the examination of these records has now been completed (Pet. 18, fn. 2), they could have no interest in further review except a desire to determine in this proceeding whether information obtained from the records would be admissible in some future trial or proceeding. Such a question would properly be presented by a motion to suppress the evidence if the government does in fact seek to use it in a future proceeding. The instant appeal from the civil contempt order is not an appropriate context in which to review that question.

(b) Even if the instant proceeding were an appropriate method of reviewing the district court's order to produce the documents, petitioners McGarry and Harrington have already litigated the validity of these summonses. After petitioners initially refused to comply with the summonses, the Internal Revenue Service brought a compliance proceeding in the district court. The district court granted the Internal Revenue Service's request and petitioners appealed, contending on five grounds that the summonses were

invalid and unenforceable. The court of appeals nevertheless affirmed and petitioners did not apply for a writ of certiorari. *McGarry's, Inc.* v. *Rose,* 344 F. 2d 416 (C.A. 1). They now raise one additional objection, that the summonses were issued in aid of a criminal investigation. Since that objection could have been raised in the previous proceedings, petitioners are now precluded from relitigating the validity of the summonses. See *Commissioner* v. *Sunnen,* 333 U.S. 591, 597.

(c) Finally, the summonses were valid in any event. Section 7602 of the Internal Revenue Code of 1954, *supra,* pp. 2–3, authorizes the Internal Revenue Service to issue administrative summonses in order to verify any person's tax liabilities, and this authority has properly been delegated to Agents and Special Agents of the Internal Revenue Service. Treas. Regs. under the 1954 Code (26 C.F.R.), §§ 301.7602–1, 301.7603–1. Any tax investigation may result in a recommendation for criminal prosecution as well as civil collection procedures. Here, as the court of appeals recognized, the instant investigation involved both civil and criminal aspects. Not until eleven months after the summonses were issued did the Internal Revenue Service investigators recommend criminal prosecution (Pet. 23–24). To deny the Internal Revenue Service the right to obtain from third parties records required in connection with a tax investigation merely because criminal prosecution is a possibility would virtually write Section 7602 out of the Code. Therefore, the lower courts have uniformly rejected such a contention. See, *e.g., Boren* v. *Tucker,* 239 F. 2d 767, 772

(C.A. 9); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2), certiorari denied, 373 U.S. 902; *Tillotson* v. *Boughner*, 333 F. 2d 515 (C.A. 7), certiorari denied, 379 U.S. 913; *Lash* v. *Nighosian*, 273 F. 2d 185, 188 (C.A. 1), certiorari denied, 362 U.S. 904.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1966.

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